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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TYRONE C. CARPENTER, Plaintiff and Appellant, v. JACK IN THE BOX CORPORATION, Defendant and Respondent.	B204180 (Los Angeles County Super. Ct. No. BC296699)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tricia A. Bigelow, Judge. Affirmed.

Marvin E. Krakow for Plaintiff and Appellant.

Manning & Marder, Kass, Ellrod, Ramirez, Mary M. Kocsis and Julie Fleming for Defendant and Respondent.

Plaintiff and appellant Tyrone C. Carpenter (plaintiff) appeals from the summary judgment entered in favor of defendant and respondent Jack In the Box Corporation (defendant) in plaintiff's action for wrongful termination in violation of public policy, employment discrimination in violation of the Fair Employment and Housing Act (Gov. Code, § 12940 et seq. (FEHA)), and breach of an express or implied contract. We affirm the judgment.

BACKGROUND

Plaintiff's Employment

Plaintiff is an African-American male who was employed by defendant as an area manager in the Los Angeles region from July 1999 until his employment was terminated in June 2002. At the outset of his employment, plaintiff acknowledged and agreed in writing that his employment relationship with defendant was to be "at will," terminable by either party at any time, with or without cause.

Defendant's Policy Regarding Harassment

Defendant has a "zero tolerance" policy against sexual harassment. Defendant's written policy against harassment that requires any employee having knowledge or suspicion of sexual harassment, whether or not as a victim, to report that knowledge to a supervisor or to call the company's ethics hotline. Defendant's harassment policy states that failure to comply with its requirements is a ground for disciplinary action, including termination of employment.

Alleged Harassment by Angelle Chapman

In March 2002, plaintiff was contacted by an employee named Brandy Tutson, who said that she had received a threatening telephone call from someone she believed to be an assistant manager named Angelle Chapman. Tutson told plaintiff that she believed Chapman was dating her restaurant manager, Michael Olokode, and that Chapman was jealous of Tutson and had therefore threatened her. On March 18, 2002, plaintiff convened a meeting with Tutson, Chapman, Olokode, and another employee named Vinny Bahuleyan. At the meeting, Tutson reiterated her allegation that Chapman had made threatening phone calls to her, and Chapman denied making any such calls.

Plaintiff issued a verbal warning that harassment would not be tolerated, and advised the parties that the matter would be investigated further. Plaintiff documented the incident and the responsive actions he had taken in a memorandum dated March 18, 2002. In the memorandum, plaintiff noted Tutson's belief that Chapman and Olokode were dating. Plaintiff sent a copy of the memorandum to Janice Sheek, defendant's human resources manager. He also spoke to Sheek by telephone and recommended further investigation of the matter.

Alleged Harassment by Plaintiff

On May 29, 2002, Sheek received a report that plaintiff had allegedly sexually harassed Chapman. Sheek subsequently met with Chapman, who said that in June 2001, plaintiff had called her at work on three separate occasions to invite her to lunch, but she had declined the invitations. According to Chapman, plaintiff called her at home approximately one month later, and asked her to come to the restaurant where she worked. When she arrived, plaintiff directed her to move her car to a parking lot across the street, where he approached her and touched her in a sexually inappropriate manner. Chapman objected, admonished plaintiff that his conduct was inappropriate, and left. Chapman stated that plaintiff called her again two weeks later, and asked her to come to the restaurant. When she arrived, the restaurant was closed and plaintiff was sitting in his car. Plaintiff directed Chapman to get inside his car and she complied. Plaintiff then made lewd comments to Chapman and sexually assaulted her. Chapman stated that after this last incident, plaintiff made no further sexual advances toward her and that neither she nor plaintiff ever discussed or acknowledged any of the alleged incidents. Chapman further stated that she never reported the incidents because she did not think anyone would believe her.

Alleged Harassment by Michael Olokode

On June 4, 2002, Sheek and Dennis Yoraway, defendant's regional asset protection manager, met with plaintiff to discuss Chapman's allegations against him. During the course of that meeting, plaintiff volunteered information about Chapman and an injury she had sustained in March 2002 that required surgery and a leave of absence.

According to plaintiff, Chapman initially reported injuring her finger while fighting with her husband. She subsequently told plaintiff she had injured her finger by striking her manager, Olokode, while resisting his sexual advances at a nightclub where the two of them were having drinks.

When Yoraway asked plaintiff what action he took after receiving this information, plaintiff responded that he attempted to contact Sheek, who was on vacation at the time. Plaintiff also said that he thought he had spoken with Olokode, and that it was his recollection that Olokode denied that the incident had occurred.

Plaintiff admitted that he did not document his conversation with Chapman about the alleged incident with Olokode, nor did he advise Chapman to call defendant's ethics hotline. Plaintiff further admitted that he did not call the ethics hotline or notify anyone in defendant's human resources department about the incident.

After meeting with plaintiff, Yoraway interviewed Olokode, who denied dating Chapman or engaging in any inappropriate conduct toward her. Olokode also denied that Chapman had hurt herself while hitting him. Olokode recalled that Chapman had told him she hurt her finger while fighting with her husband. Olokode said that plaintiff had never questioned him concerning any inappropriate conduct on his part toward Chapman.

Defendant's Investigation

On June 6, 2002, Yoraway and Nancy Taylor, defendant's regional vice president, gave plaintiff a copy of an ethics report concerning Chapman's allegations against him and gave him the opportunity to respond to the allegations. Plaintiff denied the allegations and presented his own written statement. In his written statement, plaintiff opined that Chapman's allegations were an attempt to fend off possible future disciplinary action in light of her poor work performance during the last 30 to 60 days. Plaintiff had issued verbal and written warnings to Chapman in May 2002 for improper attempts to retrieve cash shortfalls from the staff at her restaurant and for leaving work early without notifying management. During the course of the June 6, 2002 meeting, plaintiff reaffirmed that Chapman had told him she injured her finger while resisting sexual advances by her restaurant manager, Olokode, while the two were on a date.

On June 12, 2002, Yoraway and Sheek interviewed Chapman and obtained a written statement from her. When asked how she had injured her finger, Chapman replied that the injury had occurred while she was playing with her son. She denied injuring her finger while fighting with her manager, Olokode, and denied complaining about Olokode to plaintiff.

On March 20, 2002, Terry Garcia, a human resources specialist employed by defendant, met with plaintiff. During the meeting, plaintiff provided Garcia with a copy of his March 18, 2002 memorandum documenting his investigation of the threatening telephone calls Chapman had allegedly made to Tutson.

Termination of Plaintiff's Employment

Taylor terminated plaintiff's employment on June 14, 2002. Taylor advised plaintiff that he was being discharged because he failed to report or investigate an allegation of sexual harassment.

PROCEDURAL HISTORY

On May 16, 2003, plaintiff filed a FEHA complaint alleging that defendant discriminated against him and terminated his employment based on his race and sex. The Department of Fair Employment and Housing issued a notice of case closure and right-to-sue letter on May 21, 2003.

On June 2, 2003, plaintiff filed this action for wrongful termination in violation of public policy, employment discrimination, and breach of express/implied contract.[1] Following an unsuccessful special motion to strike the complaint, and our affirmance of the trial court's denial of that motion, defendant filed a motion for summary judgment or summary adjudication of issues on the grounds that there was no evidence that defendant terminated plaintiff's employment based on race or sex, that plaintiff's employment was at will, and that defendant had good cause to discharge plaintiff. In support of its motion,

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[1] Plaintiff's complaint also asserted causes of action for intentional and negligent infliction of emotional distress, breach of implied covenant of good faith and fair dealing, defamation, and interference with contract and named Angelle Chapman as a defendant. Plaintiff subsequently dismissed those causes of action and all claims against Chapman.

defendant filed a separate statement of undisputed material facts setting forth the terms of plaintiff's employment, defendant's investigation of Chapman's allegations of sexual harassment against plaintiff, and its investigation of plaintiff's response to Chapman's allegations that she had resisted sexual advances by Olokode. Defendant's separate statement is supported by plaintiff's deposition testimony, excerpts of which were filed in conjunction with defendant's motion; the declarations of Dennis Yoraway, Janice Sheek, Terry Garcia, and Nancy Taylor; and copies of relevant portions of defendant's employment policy and its policy against harassment.

Plaintiff opposed defendant's motion, arguing that defendant's stated reason for firing him was false, and that the decision to fire him was based instead on Chapman's unsubstantiated sexual harassment claims against him. Plaintiff further argued that he had reported the allegation that Chapman and Olokode were dating and that he did not believe he was obligated to report Olokode's alleged sexual advances toward Chapman because he did not view the incident as one of sexual harassment. Plaintiff maintained that defendant discriminated against him on the basis of his race by treating him differently than Caucasian managers accused of sexual harassment; that defendant discriminated against him on the basis of his sex by investigating Chapman's claims against him while ignoring Chapman's alleged harassment of a co-worker; and that defendant failed to comply with its own personnel policies concerning the investigation of harassment claims.

Plaintiff's opposition was supported by his own separate statement of disputed and undisputed material facts, which in turn was supported in large part by his own declaration and the declaration of a former employee named Pam Lavallier. Plaintiff's declaration described his interactions with Chapman, his investigation and reporting of the harassment allegations against Chapman, and defendant's investigation of Chapman's sexual harassment allegations against him. Lavallier's declaration describes defendant's alleged retaliation against her after she complained about alleged sexual harassment by a white male supervisor. The trial court sustained all of the evidentiary objections to the Lavallier declaration, and many of the objections to plaintiff's declaration.

Defendant's summary judgment motion was heard on May 30, 2007. Following argument by the parties, the trial court took the matter under submission and subsequently issued an order granting defendant's motion for summary judgment. Judgment was entered on October 11, 2007. Plaintiff appeals from that judgment.

DISCUSSION

I. Standard of Review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Id.* at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified Sch. Dist.* (1995) 32 Cal.App.4th 218, 222.) In doing so, we

"[consider] all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

II. Discrimination

Plaintiff's claim for discrimination on the basis of race and sex is governed by FEHA. That statute provides in relevant part: "It shall be an unlawful employment practice . . . : [¶] (a) For an employer, because of the race, . . . color, . . . sex . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).)

A prima facie case of race or sex discrimination requires evidence of satisfactory job performance, an adverse employment action, and circumstances that suggest a discriminatory motive, for example, that the position was filled by someone outside the protected classification. (*Mixon v. Fair Employment and Hous. Com* (1987) 192 Cal.App.3d 1306, 1316-1317.) An employer seeking summary judgment in a discrimination case meets its burden by showing that one or more of these prima facie elements is lacking, or that legitimate, nondiscriminatory reasons existed for the adverse employment action. "'[L]egitimate' reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination.* [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 358.) Following such showing by the employer, the burden shifts to the employee to demonstrate that the reasons for termination are a pretext and that the employer acted with a discriminatory motive. (*Id.* at pp. 354-356.) To do so, the employee must present "'substantial responsive evidence' that the employer's showing was untrue or pretextual. [Citation.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)

"Pretext may be inferred from the timing of the discharge decision, the identity of the decisionmaker, or by the discharged employee's job performance before termination.

[Citation.]" (*Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 224.) An employee may raise a triable issue of fact regarding pretext by presenting evidence of implausibilities, inconsistencies, or contradictions in an employer's proffered reason, or with direct evidence of a discriminatory motive. (*Guz, supra*, 24 Cal.4th at pp. 356, 363.) To raise a triable issue of fact, however, the employee's evidence must do more than present a "weak suspicion" that discrimination was a likely basis for the termination. (*Id.* at pp. 369-370.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id*. at p. 361, fn. omitted.)

Plaintiff failed to establish a prima facie case of race or sex discrimination. There is no evidence suggesting that defendant acted with discriminatory animus in terminating plaintiff's employment. Plaintiff's claim that defendant's "real" reason for firing him was Chapman's unsubstantiated allegations that he had sexually harassed her, rather than his failure to report the alleged harassment by Olokode, is unsupported by the evidence and fails to establish any discriminatory motive for defendant's actions.

There is no admissible evidence that defendant treated similarly situated white employees or female employees more favorably. Plaintiff's replacement following his discharge was an African-American male. The trial court sustained evidentiary objections to plaintiff's evidence that defendant treated him differently than Chapman in investigating alleged harassment claims against each of them. The trial court also sustained objections to evidence that defendant disciplined plaintiff more harshly than a Caucasian male area manager accused of harassing a female subordinate. Plaintiff has not challenged the trial court's evidentiary rulings and has accordingly waived that issue on appeal. (*Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, 1048.) Our review is limited to the admissible evidence, and that evidence does not support plaintiff's claim of race or sex discrimination.

Defendant, moreover, presented a legitimate, nondiscriminatory reason for discharging plaintiff -- his failure to report Chapman's allegation that she had injured

herself while resisting sexual advances by her manager. Plaintiff presented no substantial responsive evidence that this reason was false or pretextual. Plaintiff's belief that he was not obligated to report Chapman's allegations because he did not view the incident as sexual harassment does not preclude defendant from discharging him for the failure to do so. There is no evidence to support plaintiff's claims that defendant's "real" reason for firing him was Chapman's unsubstantiated allegations that he sexually harassed her, or that defendant gave "shifting" or inconsistent reasons for firing him, nor is there evidence that suggests any discriminatory motive for defendant's actions. Plaintiff failed to present any triable issue of material fact with regard to the trial court's adjudication of his FEHA discrimination claim.

III. Wrongful Termination

Plaintiff's cause of action for wrongful termination in violation of public policy is premised on defendant's alleged violation of FEHA by discriminating against him on the basis of his race and sex. Because plaintiff failed to present any admissible evidence of sex or race discrimination, he failed to establish a prima facie case of wrongful termination in violation of public policy.

IV. Breach of Express/Implied Contract

"Labor Code section 2922 provides that '[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other.' An at-will employment may be ended by either party 'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice. [Citations.]" (*Guz., supra,* 24 Cal.4th at p. 335.) Here, the undisputed evidence shows that plaintiff's employment with defendant was terminable at will. Defendant was entitled to discharge plaintiff at any time, without cause. (*Ibid.*) No triable issue of fact thus exists with respect to plaintiff's cause of action for breach of express contract.

Plaintiff contends that defendant's written employment policies governing employee discipline and requiring fair, thorough, and impartial investigations were an implicit part of his employment agreement and that defendant breached that agreement by failing to follow its own policies. It is true that "an employer's written personnel policies

may be an important source of implied-contract evidence." (*Guz, supra*, 24 Cal.4th at p. 344.) A trier of fact may infer an agreement to limit the grounds for discharging an employee based on the employee's reasonable reliance on such personnel policies. (*Ibid.*) "When an employer promulgates formal personnel policies and procedures in handbooks, manuals, and memoranda disseminated to employees, a strong inference may arise that the employer intended workers to rely on these policies as terms and conditions of their employment, and that employees did reasonably so rely. [Citation.]" (*Ibid.*) Defendant's written personnel policies are therefore relevant to our contractual analysis. (*Id.* at p. 345.)

Defendant's written personnel policies include the following statement: "Nothing in this handbook shall restrict or in any way modify the right of the employer (Jack in the Box Inc.) to terminate the employment relationship at will. Your employment relationship may be terminated with or without notice or cause at any time at the option of either the employer or you." Defendant's written personnel policies further state that "nothing in this handbook is intended to, or should be construed to constitute a contract of employment between your employer (Jack in the Box Inc.), and you." These express statements and disclaimers appear sufficient to overcome any inference that plaintiff could reasonably rely on any part of defendant's personnel policies as additional terms and conditions of his employment.

Defendant's written discipline policy, in any event, does not limit defendant's ability to terminate plaintiff's employment. The policy sets forth procedures for various employee disciplinary actions, including verbal counseling, and issuing and documenting written reprimands. Nothing in that policy restricts defendant's right to terminate the employment relationship. Similarly, there is nothing in defendant's harassment policy that limits defendant's ability to discharge an employee. To the contrary, defendant's harassment policy simply states that violation of its requirements "will result in disciplinary action up to and including termination."

Plaintiff, moreover, presented no evidence that defendant failed to comply with its own written personnel policies. The undisputed evidence is that plaintiff failed to comply

with the harassment policy by not reporting Chapman's allegation that she injured herself while resisting sexual advances by her manager. Defendant's harassment policy expressly provides that plaintiff's employment could be terminated for this reason. No triable issue of fact exists with regard to plaintiff's implied contract claim.

V. Conclusion

Plaintiff failed to present a prima facie case of race or sex discrimination, wrongful termination, or breach of contract. Summary judgment was properly entered in defendant's favor.[2]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD

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[2] In this appeal, plaintiff also argues that California's summary judgment law violates the Seventh Amendment of the United States Constitution, but cites no authority, apart from a law review article, to support this argument. We disregard the argument as it is perfunctorily asserted and inadequately supported by legal authority.